Electronically Filed 12-5-06

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WRS, INC., d/b/a WRS MOTION PICTURE LABRATORIES, a corporation, Plaintiff, v. PLAZA ENTERTAINMENT, INC., a corporation, ERIC PARKINSON, an individual, CHARLES BERNUTH, an individual, and JOHN HERKLOTZ, an individual, Defendants.	:	CIVIL ACTION NO. 00-2041

DEFENDANT HERKLOTZ'S RESPONSE TO
PLAINTIFF WRS' MOTION FOR SUMMARY JUDGMENT AS TO DAMAGES

Defendant, JOHN HERKLOTZ, by his attorneys, BURNS, WHITE & HICKTON, LLC, sets forth the following Response to Plaintiff WRS' Motion for Summary Judgment as to Damages, of which the following is a statement:

1. Admitted, however, the Court's decision to grant summary judgment to Plaintiff as to liability is a ruling with which Defendant Herklotz respectfully disagrees and is subject to appeal.

Electronically Filed 12-5-06

2. Denied as stated. The March 22, 2006 stipulation is a document that speaks for itself. Therefore, Plaintiff's characterization of the purpose of the stipulation is denied.

3. Admitted.

4. Admitted in part, denied in part. It is admitted that Schneider Downs (not "Schneider Downes"), through Thomas Claasen and John Briggs, have prepared a report. (Referred to in this Response as "the Schneider Downs Report" or "the Report"). It is admitted that a copy of the Schneider Downs Report is attached to Plaintiff's Concise Statement. Plaintiff's characterization of the Schneider Downs Report is denied, as the Report is a written document that speaks for itself and Defendant Herklotz believes that Plaintiff has mischaracterized the Report, as well as the findings and conclusions that can reasonably be derived from the Report.

5. Denied. It is denied that, at this stage of the proceeding, Defendant Herklotz has not pleaded or otherwise presented any evidence that would create a genuine issue of material fact that the amount shown on the business records of WRS is not, in fact, the amount owed. On the contrary, at the outset of this matter, Defendant Herklotz filed an Answer and Affirmative Defenses that created multiple issues of material fact relative to damages. In addition,

Defendant Herklotz filed a Motion for Summary Judgment that sought, in the alternative, a ruling to the effect that WRS's damages were so fraught with material issues of fact as to render the calculation of damages with certainty an impossibility. In paragraph 22 of Defendant Herklotz's Motion for Summary Judgment, he raised the following genuine issues of material fact:

> WRS and Plaza's documents, for which WRS was responsible pursuant to the Services Agreement, are missing, have not been produced, or were never created in the first instance. Examples include the following:
>
> a. Plaza's earliest purchase orders with WRS, detailing the quantities ordered, the titles duplicated and the Plaza customers to whom they were shipped, were not kept after production (Napor Deposition, pp. 66:12-25, 67:1-21);
>
> b. Mr. Napor estimates that the volume of business that WRS performed for Plaza prior to the July 24, 1998 date cited in the Complaint was *approximately* $121,000, but *could have been* more. (Napor Deposition p. 74:8-22);
>
> c. WRS has not produced or cannot produce any document indicating that an account receivable was owed to WRS by Plaza as of July 24, 1998, the date of the submission of the updated account application/ Credit Application upon which the instant lawsuit is premised. "[W]e can't find what you're asking for in July." (Napor Deposition, pp. 77:16-25, 78:2-25);
>
> d. WRS cannot ascertain whether Plaza's account balance as of August 31, 1998, the date designated by the July 24, 1998 Account Application when Plaza was to fully pay its outstanding balance, was $685,379 as pleaded in the Complaint or $720,679 as indicated on an August 31, 1998 account statement marked as Napor Deposition Exhibit No. 4.

e. Explaining reasons why so many records are not provided or cannot be located, Mr. Napor stated, "Over the time, and we haven't been a fully functional business, ... [S]omewhere along the line we have lost track of some paperwork because I remember it being much more voluminous that we have now, but I also don't think there was anything germane. I think we have all the important stuff here." (Napor Deposition, pp. 107:23-24, 108:4-10);

f. August 26, 2001 *Pittsburgh Post Gazette* interview of Jack Napor regarding WRS record keeping problems;

g. Mr. Napor, whose knowledge is imputed to WRS by virtue of his corporate designee status, stated that he had no understanding of the total amount of money that was deposited into the lockbox account. (Napor Deposition, pp. 144:3-6, 198:7-25, 199:2-3);

h. When asked to produce all documents demonstrating that WRS billed Plaza during the seventeen (17) month period that WRS performed administrative services rendered pursuant to the Services Agreement, WRS states there were "none." See WRS's Response to Request No. 5 of Herklotz' Second Request for Production of Documents; and

i. Beginning in January 2000, problems with WRS's new computer software system resulted in frequent errors including: over billing and under billing clients and adding 0's unpredictably to either the quantity of products ordered or the unit prices, inflating the value of the invoices. (Napor Deposition, pp. 226:11-25, 227:2-13).

WRS could not reconcile their records regarding Herklotz's request for a breakdown by titles or video even after three attempts to do so. Therefore, it is incorrect and misleading for WRS to aver that prior to its Motion for Summary Judgment as to Damages, Herklotz had not placed anything on the record to create a genuine issue of material fact as to damages. In addition, although Schneider Downs engaged in a mechanical process of "ticking and tying" some elements of WRS's records for internal consistency, even a brief review of the Schneider Downs Report indicates that the Report itself sets forth a number of issues that present genuine issues of material fact as to the method that Schneider Downs employed and the questions that the Schneider Downs Report does not even address, let alone answer. (See Affidavit of John Herklotz, filed in the Appendix accompanying these documents, and incorporate herein by reference.) For example, a review of all WRS's records indicates that businesses controlled and/or operated by defendants Parkinson and von Bernuth (the "Parkinson Affiliates") had separate commercial relationships with WRS during the period 1998 through 2001. Schneider Downs' examination of the books and records of WRS did not attempt to ascertain whether services provided to the Parkinson Affiliates were invoiced to Plaza Entertainment, or that payments made by Plaza Entertainment were applied to obligations of the affiliate companies. It is Mr. Heklotz's contention that Messrs. Parkinson and von Bernuth routinely ignored corporate formalities in connection with the operation of their various businesses, and may have deliberately caused the reported amounts owing by Plaza Entertainment to be in error, with or without the active participation by the Plaintiff. Schneider Downs failure to investigate these allegations raises serious questions as to the accuracy of the analysis and conclusions in the Schneider Downs Report.

6. Admitted in part, denied in part. It is admitted that Jack Napor, on behalf of WRS, filed an Affidavit that purports to demonstrate the amount WRS believes it is owed from Defendant Herklotz. It is denied that the Affidavit of Jack

Napor actually represents and/or establishes the amounts owed, if any, by Defendant Herklotz. By way of further response, the admissions made by Mr. Napor, under oath during his deposition call into question the sworn conclusions alleged by Mr. Napor in his affidavit, and further raises issues of fact appropriate for trial with regard to the proper measure of damages, if any, in this matter. Additional questions of material fact are created by the execution of the Services Agreement by and between Plaza Entertainment, Inc. and WRS, and the impact of that agreement on the risk, and thus the damages, if any, properly payable by Defendant Herklotz on the Guaranty.

7. Admitted only to the extent that Thomas E. Reilly, Esq. has prepared and filed an Affidavit in support of the legal fees that WRS claims are owed. This portion of the claim is disputed, therefore, Defendant Herklotz denies the alleged entitlement and denies all of the remaining allegations. Further, a review of the itemized time entries by Mr. Reilly and his staff indicate that a significant number of those entries are not properly chargeable to Mr. Herklotz under any factual or legal theory. By way of example only, and not intending to be comprehensive, a large number of the entries appear to relate to general business advice rendered by Mr. Reilly to Mr. Napor and/or WRS and have nothing whatsoever to do with collection of amounts pursuant to the suretyship document executed by Mr. Herklotz.

8. Admitted in part, denied in part. It is admitted that, purely from a numeric perspective, the amount claimed by WRS is the amount indicated in Paragraph 8 of WRS' Motion for Summary Judgment as to Damages. Based on the information previously outlined in this response, in paragraphs 6 through 8 specifically, it is denied that the amount asserted by WRS is supportable by the records at issue, or appropriate as a measure of damages against Defendant Herklotz. To the contrary, Defendant Herklotz has raised significant issues of material fact with regard to the accuracy of the records underlying the numbers asserted by Plaintiffs, and examined by Schneider Downs, such that the reliability of the numbers themselves is seriously called into question.

9. Admitted in part, denied in part. It is admitted that, purely from a numeric perspective, the amount claimed by WRS is the amount indicated in Paragraph 9 of WRS' Motion for Summary Judgment as to Damages, exclusive of interest. Based on the information previously outlined in this response, in paragraphs 6 through 8 specifically, it is denied that the amount asserted by WRS is supportable by the records at issue, or appropriate as a measure of damages against Defendant Herklotz. To the contrary, Defendant Herklotz has raised significant issues of material fact with regard to the accuracy of the records underlying the numbers asserted by Plaintiffs, and examined by Schneider Downs, such that the reliability of the numbers themselves is seriously called into question.

Electronically Filed 12-5-06

10. Denied.

WHEREFORE, for all of the foregoing reasons, defendant, John Herklotz, respectfully requests that this Honorable Court sign the attached Order denying WRS summary judgment on damages.

Respectfully submitted,

BURNS, WHITE & HICKTON, LLC

By: /s/ John P. Sieminski

John P. Sieminski, Esquire
Pa ID #58991
Chad A. Wissinger, Esquire
Pa ID #82813

BURNS, WHITE & HICKTON, LLC
106 Isabella Street
Pittsburgh, PA 15212
(412) 995-3000
(412) 995-3300 Fax #

jpsieminski@bwhllc.com
cawissinger@bwhllc.com
Attorneys for Defendant, John Herklotz